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IN THE

Supreme Court of the United States

MICHAEL J. BROWN,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONER'S REPLY BRIEF TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent Department of the Navy argues that review of the decision of the Federal Circuit is not warranted because the decision below is simply the result of the appellate court's review of the administrative record. Respondent also argues that there is no conflict between the Federal Circuit's decision in the present case and the application of the nexus requirement by other circuits. Neither of these positions has merit.

While conceding that the nexus requirement set forth in 5 U.S.C. 7513(a) "is important" (Brief for the Respondent in Opposition (Opp.) 5), respondent endeavors to characterize the present case as simply involving an application of the "substantial evidence" standard with a "disagreement" by

petitioner with "the court of appeals' view of the evidence." Opp. 11. However, respondent badly misstates the premise for the present petition. The removal of Mr. Brown was justified on the bald assertions of Marine officials (and one volunteer coordinator who was the spouse of a Marine unit commander) that Marine unit commanders would hesitate to use Mr. Brown's services as a Program Manager because of a loss of "trust and confidence" in Mr. Brown and because of a perceived "mission impairment" as a result of the off-duty purported affair.[1] The issue before this Court is whether speculative testimony merely asserting discomfort and/or a perceived loss of credibility with utilizing an employee's civilian job services because of that employee's lawful off-duty activity is by itself adequate evidence of nexus so as to warrant removal of a civilian employee. For the reasons explained in the petition, the type of evidence asserted by respondent to be "substantial" is inadequate evidence of nexus. *See United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) ("substantial evidence" is a standard going to "the reasonableness of what the agency did *on the basis of the evidence before it*" (emphasis in original)).

In its opposition to the petition, respondent also maintains that a nexus finding based on a loss of trust and confidence

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[1] Respondent's allusion to testimony of a loss of trust or confidence by "co-workers" (Opp. 5) is misleading. The agency employees or officers who were witnesses for respondent in the MSPB proceeding held positions of authority, including positions of direct authority over Mr. Brown. Petition for a Writ of Certiorari (Pet.) 4; Appendix (App.) 4a-7a, 16a-17a. MSPB Vice Chair Slavet correctly observed that there is no evidence that either co-workers of Mr. Brown (*i.e.*, nonsupervisory employees working with Mr. Brown) or rank and file Marines and their families objected to Mr. Brown's continued employment. App. 32a; *see also* App. 18a (Circuit Judge Linn's observation that there is no direct testimony from either Marines or their family members expressing discomfort with Mr. Brown's continued employment as a Program Manager).

can be justified because an agency "need not wait until the expected effect upon job performance or agency mission occurs before removing the employee." Opp. 6-7. Even accepting this position as correct, it simply begs the question of *what* future actions does respondent fear from Mr. Brown so as to cause the loss of trust and confidence. After all, for the assertions of respondent's witnesses to constitute adequate evidence of nexus, it is necessary that these fears of adverse future repercussion on job responsibilities be rationally based. Yet it is clear that *what* respondent presumably fears from Mr. Brown's continued employment is so irrational in nature that a nexus finding cannot be justified on this loss of "trust and confidence."

Specifically, Mr. Brown's job as Program Manager is to plan, develop and coordinate recreational events for Marines and their dependents. App. 2a, 16a-17a. Mr. Brown is not a "counselor" or "therapist" for Marine families. App. 16a-17a. There is no indication either that Mr. Brown, due to his off-duty activity, is unable to perform the planning, development and coordination duties of a Program Manager or that the quality of Mr. Brown's planning, development or coordination duties is impugned by any off-duty affair of Mr. Brown. *See* App. 15a (Circuit Judge Linn's description of the lack of evidence of any negative impact on Mr. Brown's job resulting from Mr. Brown's off-duty relationship). Rather, what prompts respondent's asserted loss of "trust or confidence" is the premise that Mr. Brown's continued employment will allow Mr. Brown to "woo" the spouse of a deployed Marine for purposes of a romantic and/or sexual liaison. Yet under the indisputable facts before this Court, announcement of a loss of trust or confidence based on such fears cannot justify a nexus finding.

First and foremost, any off-duty affair involving Mr. Brown did not arise out of the performance of Mr. Brown's civilian job duties (App. 9a) and there is no evidence to

suggest that Mr. Brown would use his job responsibilities to foster a personal relationship. Indeed, the spouse involved in Mr. Brown's purported affair was a woman Mr. Brown knew as a personal friend for years prior to the commencement of his civilian employment. The beginning of this friendship even occurred at a different location than the Marine base where Mr. Brown was employed as a civilian. Any relationship involving Mr. Brown was consensual, had no basis in the work arena, and resulted from a special affinity between the two persons not readily duplicated. There is no evidence to suggest that Mr. Brown, on the basis of this one-time relationship, is more likely to have an affair with the spouse of a deployed Marine in the future than any other person, civilian or Marine. To justify a nexus finding based on speculative fears of a future relationship, coupled with claims of lost "trust and confidence" would allow for any irrational belief, subjectively held, to similarly justify removal of a civilian employee. However, the nexus requirement contemplates a far more direct correlation between an employee's off-duty activity and the employee's job responsibilities than the claims of lost trust and confidence present here.

Respondent also takes issue with petitioner's position (Pet. 16) that the mores of the "Marine community" cannot provide the basis for a nexus finding in Mr. Brown's case. Opp. 8. In this regard, respondent cites *Giles v. United States*, 553 F.2d 647 (Ct.Cl. 1977), and *Masino v. United States*, 589 F.2d 1048 (Ct.Cl. 1978), as authorities for the proposition that an agency's mores may be considered in evaluating the agency's demonstration of nexus. However, respondent badly misreads both *Giles* and *Masino*. *Giles* involved an Internal Revenue Service agent who was responsible for the collection of delinquent tax payments and returns and who was removed after he failed to timely file his own returns. 553 F.2d at 648. *Masino* involved a customs inspector required to enforce laws against marijuana who was removed for his off-duty personal

use and transportation of marijuana. 589 F.2d at 1049. In both cases, a nexus was found, *not* because of the "mores" of the employing agency, but because the employee's off-duty conduct constituted a direct impairment of the agency's mission. *See Giles, supra* at 650; *Masino, supra*, at 1056. In turn, the impairment of the agency mission was found in both *Giles* and *Masino* not because of individual displeasure toward the subject conduct, but because the integrity of future job performance by the employee was impugned by the employee's off-duty activity. *See e.g., Giles, supra,* at 650 ("how must it appear to plaintiff's fellow workers, to revenue officials of the state, and to other members of the taxpaying public who know of it, that an agent of the IRS evaded compliance with so elementary, but fundamental, a requirement of the income tax system"); *Masino, supra*, at 1056 ("[s]ince possession and/or use of marijuana is a violation of federal criminal statutes, [plaintiff] was clearly not conducting himself in a manner to be expected of a Government employee engaged in law enforcement duties"). By contrast, the lawful off-duty conduct attributed to Mr. Brown does not cause impugnment of the integrity of his planning duties as a Program Manager.

The Federal Circuit's and respondent's reliance on the "mores" of the "Marine community" actually demonstrate how badly the Federal Circuit's decision has distorted the nexus requirement and how necessary it is for certiorari to be granted in this case. To conclude that a nexus is met because a person who benefits from Mr. Brown's services has knowledge of, and objects to, Mr. Brown's off-duty activities is tantamount to writing the nexus requirement out of 5 U.S.C. 7513(a). The business of government is to provide services to the public. The "logical" extension of the respondent's illogical position on "mores" is that a nexus can be found whenever a beneficiary of agency services objects to conduct attributed to a federal agency employee. Under this theory, for example, any off-duty conduct by an Internal

Revenue Service agent or a Department of Agriculture meat inspector can be the basis for employment discipline since these employees provide service benefitting the general public. Contrary to this theory, the nexus requirement is narrow and justifies employee discipline for off-duty activities "only" when the discipline is "for such cause as will promote the efficiency of the service."

Finally, the respondent also takes issue (Opp. 9-11) with petitioner's position that the Federal Circuit's decision in this case conflicts with the standards established for the application of the nexus requirement by other federal appellate courts. Nevertheless, respondent recognizes that federal appellate courts other than the Federal Circuit can address nexus issues in certain cases. Opp. 9-10. Moreover, other federal appellate courts have found, in contrast to the Federal Circuit's present decision, that a nexus between off-duty conduct and the "efficiency of the service" cannot be simply shown by bald claims of lost "trust and confidence," that evidence of an adverse impact on job performance is necessary to show nexus, and that more than simply immoral or deviant off-duty behavior must be shown to meet the nexus requirement. *See* Pet. 19-20 (description of case decisions by numerous appellate courts demonstrating the heavy burden placed on employer discipline by the nexus requirement).

Ultimately, the points raised by respondent fail to refute the need for certiorari shown in the pending petition. The Federal Circuit's decision is clearly erroneous and certiorari should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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